IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 31ST OCTOBER 2006 / 9TH KARTHIKA 1928

RP.No. 706 of 2004(A)

AGAINST THE JUDGEMENT/ORDER IN SA.706/2000 Dated 18/01/2001
AS.373/1997 of DISTRICT COURT, THRISSUR
O.S.439/1990 OF THE MUNSIFF'S COURT, CHAVAKKAD.

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REVIEW PETITIONERS/RESPONDENTS 1 TO 4 IN S.A:

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1. SATHY, W/O. KOZHIPARAMBIL VASUDEVAN,
   EDAMUTTAM DESOM, VALAPPAD VILLAGE,
   CHAVAKKAD TALUK.

2. VINOJ, S/O. KOZHIPARAMBIL VASUDEVAN,
   EDAMUTTAM DESOM, VALAPPAD VILLAGE,
   CHAVAKKAD TALUK.

3. SHIJITH, S/O. KOZHIPARAMBIL VASUDEVAN,
   EDAMUTTAM DESOM, VALAPPAD VILLAGE,
   CHAVAKKAD TALUK.

4. SHINE, S/O. KOZHIPARAMBIL VASUDEVAN,
   EDAMUTTAM DESOM, VALAPPAD VILLAGE,
   CHAVAKKAD TALUK.

BY ADV. SRI.R.LAKSHMI NARAYAN
SMT.R.RANJINI
SRI.G.KRISHNAKUMAR

RESPONDENTS: APPELLANTS & RESPONDENTS 5,6, & 7 IN S.A.

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1. THARA, W/O. KOZHIPARAMBIL SUDHAKARAN
   EDAMUTTAM AMSOM, DESOM, CHAVAKKAD TALUK.

2. DAMODARAN, AGED 81, S/O. KOZHIPARAMBIL
   VASUDEVAN (DIED), EDAMUTTAM DESOM,
   VALAPPAD VILLAGE, CHAVAKKAD TALUK.

3. BIJI, D/O. KOZHIPARAMBIL SUDHAKARAN,
   EDAMUTTAM AMSOM, DESOM, CHAVAKKAD TALUK.

4. JOSHY, S/O. KOZHIPARAMBIL SUDHAKARAN,
EDAMUTTAM AMSOM, DESOM, CHAVAKKAD TALUK.

BY ADV. SRI.M.S.UNNIKRISHNAN
SRI.M.J.JOHNSON

THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON 28/06/2006, THE COURT ON 31/10/2006 PASSED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN, J.

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C.M.Appl.221 of 2005, I.A. 868 of 2006 and

R.P.No.706 OF 2004 in S.A.706 of 2000

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Dated this the 31st day of October, 2006.

O R D E R

The captioned matters were heard together and are being disposed of by this common order.

2. Review Petition No.706 of 2004 was allowed on 29-11-2004.

3. I.A.No.868/2006 is filed seeking to set aside the aforesaid order. The ground urged is that, for the reasons stated in paragraph 5 of the affidavit accompanying the said petition, the applicant, the first respondent in the review petition, who was the appellant in the second appeal, could not appear at the hearing.

4. Having heard the learned counsel for parties, I am satisfied that the applicant has shown sufficient cause to set aside the order passed on 29-11-2004 and for re-

hearing R.P.706/2004, on merits.

5. Accordingly, C.M.Appl.No.221/2005 seeking to condone the delay of one day in applying to set aside the order dated 29-11-2004 on R.P.No.706/2004 and I.A.No.868/2006, seeking to set aside the aforesaid order are allowed.

6. The petitioners in R.P.No.76 of 2004 are the plaintiffs in the suit from which the second appeal arose.

7. The suit was one for partition of 1 acre 35 cents purchased by three brothers as per Ext.A1. The legal representatives of one among them, Vasudevan, filed the suit claiming partition, for 1/3 share. The other two brothers are defendants 1 and 2. The third defendant, the wife of the second defendant resisted the suit on the ground that after the purchase of the property by the three brothers as per Ext.A1 on 27-8-1953, her husband, the second defendant who, by now, is no more, executed Ext.B5, an unregistered lease in favour of one Raman on 19-3-1960 and that the said Raman executed Ext.B1 on 8-6-1972 in favour of one Amir who, in turn, executed Ext.B6 in favour of the third defendant. On the strength of the aforesaid

documents, the third defendant resisted the suit.

8. After Ext.B6 document in favour of the third defendant, she approached the Land Tribunal under the Kerala Land Reforms Act and obtained Ext.B2 certificate.

9. The trial court framed additional No.4 as to whether the third defendant is entitled to get any reservation in the event of partition.

10. The Courts below, on examining the entire evidence on record, came to the finding that Ext.B5 is a fraudulent document without authorisation of the other two co-owners and that therefore, the documents that followed it, namely, Exts.B1 and B6 are also invalid. The certificate of purchase issued by the Land Tribunal was also found to be worthless. Accordingly, the Courts below concurrently held that the third defendant had no right to oppose partition.

11. In the second appeal before this Court, the concurrent findings were challenged on the main ground, as discernible from the judgment dated 18-1-2001, that Ext.A1 contains an observation regarding the discharge of an earlier debt and therefore, there was no necessity for any

fraudulent transaction and hence, Ext.B5 is a genuine document. It was accordingly urged that Ext.B5 and subsequent transactions require to be upheld.

12. After hearing the plaintiffs also, this Court dismissed the second appeal holding that the trial court has given an acceptable reasoning to hold that Ext.B5 was a fraudulent document. This Court, accordingly, held that there was no irregularity or infirmity in the findings of the trial court as approved by the lower appellate court. The learned Judge, who disposed of the second appeal, specifically found that there are no reasons to interfere with the concurrent judgments delivered by the Courts below.

13. It appears that on behalf of the third defendant, the appellant in the second appeal, it was alternatively urged that in the event of the appeal being dismissed, the compensation for the value of improvements effected by the appellant can be examined and awarded in the final decree stage. The learned Judge, while dismissing the appeal, stated as follows:

> "However, in the final decree stage if the court finds that the appellant is in possession of the property and effected

improvements, proper finding can be recorded with reference to the compensation."

14. The third defendant carried the matter to the Apex Court and SLP(Civil)No.8952/2001 was dismissed. It is stated that the said order was after issuing notice on the special leave petition and hearing the opponents.

15. The learned counsel for the review petitioners urged that the afore-quoted observation in the judgment sought to be reviewed is an error apparent on the face of the record and there was no legal or factual foundation to make any such observation at all. It is urged that the quality of the possession of the third defendant having been held by the Courts below as one by which she had no better possession than that of the heir of a co-owner, the question of the third defendant claiming value of improvement does not arise at all. The learned counsel for the review petitioners makes specific reference to the finding of the trial court under Additional Issue No.4 that the third defendant is not entitled to get any reservation, which finding has been confirmed in first appeal. As the findings have been confirmed by this Court in the judgment sought to be reviewed, it is urged that the aforesaid

observation ought not to have been made. The learned counsel for the review petitioners pointed out that the aforesaid observations are now being used to wake up an issue of compensation which stood concluded by the findings in the judgments confirmed in the second appeal.

16. Per contra, the learned counsel for the third defendant, in opposition to the review petition, urged that a reading of the last paragraph of the impugned judgment and the last portion of the penultimate paragraph would show a conscious application of mind by the learned Judge on the contentions of the third defendant, the appellant in the second appeal, that the compensation for value of improvements effected by the appellant can be examined and awarded in the final decree stage. It is accordingly urged that the situation cannot be treated as an error apparent on the face of the record and therefore, the application for review is not sustainable in terms of the parameters for review.

17. Though the third defendant had filed SLP before the Apex Court against the judgment sought to be reviewed, leave was not granted, though the opponents were heard after notice. Obviously, therefore, it is a case where the

SLP was dismissed without the same being permitted to attain the characteristics of an appeal. Therefore, following the judgment of the Apex Court in ***Kunhayammed's case [(2000) 6 SCC 359]***, this application for review can be entertained by this Court.

18. It is certain that when the Court has decided a point, it would not be a situation of an error being apparent on the face of the record, even if the decision on the said issue is erroneous. However, when the disposal of the issue is without adverting to or applying mind to a provision which gives the Court the jurisdiction to go in a particular way, that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Rule 1 of Order 47. (See the judgment of the Federal Court in ***Hari Sankar v. Anath Nath*** [***AIR (36) 1949 Fed. Court 106]*** and ***M.M.B.Catholicos v. M.P.Athanasius (AIR 1954 SC 526***). As has been held by this Court in ***Pathrose v. Kuttan (AIR 1969 Kerala 186)***, an error to be one apparent on the face of the record, need not be limited to errors of fact but could extend to errors of law as well. If the mistake is apparent, be it of law or of fact, on a perusal of the records, then an application for review would lie. The Court may also

reopen its judgment, if a manifest wrong has been done.

19. The learned counsel for the third defendant urged that having regard to the provisions contained in the Kerala Compensation for Tenants Improvements Act and the relevant pronouncement of this Court, including ***Veerasikku Gounder v. Kurian (1960 KLT 213), Moideenkutty v. Subhadra (1966 KLT 1125), Achamma v. Ummaya [1999(2) KLT 539], Augusty Devassia v. Haridasan Nair [1998 (2) KLT 6 (FB)]***, a person who might have made improvements while in possession under a defective title, as also tenants, would be entitled to value of improvements. But then, as rightly urged by the learned counsel for the review petitioners, the trial court framed Additional Issue No.4 as to the question whether the third defendant is entitled to any reservation and found against the said issue. The trial court also found under Issue No.5 that the plaintiffs are entitled to mesne profits.

20. The entitlement, if any, of a co-owner to value of improvements, unlike in the case of mortgagees, is a claim to be raised and got tried and decided upon in the suit itself. Such issue is concluded against the third defendant by the findings of the Courts below that she is

not entitled to any reservation in the event of the Court ordering partition. While the second appeal was dismissed without interfering with the concurrent findings of the Courts below, in view of the statutory embargo in the form of Section 100 of the CPC against interference, except on a substantial question of law, having regard also to the binding pronouncements of the Apex Court in that regard, there could not have been any exercise of leaving open any question, already decided against the appealing defendant. The dismissal of the second appeal affirmed the preliminary decree for partition and also the finding that the third defendant, the appellant in the second appeal, had no better right than an heir of a co-owner. Hence, the observation of which we are concerned in this review petition, is, obviously, an error apparent on the face of the judgment. The same is to be reviewed, to render justice to the successful plaintiffs.

21. The result of the observations sought to be deleted has resulted in injustice. An issue which stood concluded by the concurrent decisions of the Courts below and by the dismissal of the second appeal, has apparently been retrieved on the basis of the said observation leading the parties to a long drawn litigation even after the

second appeal was disposed of on 18-1-2001, as per the judgment sought to be reviewed. In this view of the matter also, the error sought to be reviewed deserves to be reviewed, not only to rectify, but also to ensure that justice is done.

In the result, the application for review is allowed and the judgment dated 18-1-2001 on S.A.No.706/2000 is reviewed and the last sentence in the said judgment which reads as follows:

> "However, in the final decree stage if the court finds that the appellant is in possession of the property and effected improvements, proper finding can be recorded with reference to the compensation."

is deleted. There will be no order as to costs.

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

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